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Supreme Court U.S.
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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN RICE,

Petitioner,

vs.

TERRY McCANN, Warden,
Centralia Correctional Center,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the application by the Illinois Supreme Court of Chambers v. Mississippi, 410 U.S. 284 (1973) and Ohio v. Roberts, 448 U.S. 56 (1980), unreasonable under 28 U.S.C. § 2254(d) when it excluded preliminary hearing testimony of a co-defendant who at trial invoked his Fifth Amendment right not to incriminate himself, where the issue at the preliminary hearing and at trial was essentially the same and where the prosecutor had the opportunity to and did cross-examine the witness at the preliminary hearing?

2. Whether defendant's Sixth and Fourteenth Amendment rights to present exculpatory evidence were violated when defendant was prevented from presenting crucial exculpatory evidence, the prior sworn testimony of a witness who was cross-examined by the prosecution at a pre-trial motion to suppress, and hence, the prosecutor had an opportunity and similar motive to cross-examine, because the real factual dispute both at pre-trial motion and at trial was the same: when the police arrived, did co-defendant have the bag of drugs secreted in his pants, or was it in defendant's hands being passed to co-defendant, and where any speculative inability of the prosecution at the motion to suppress, to demonstrate defendant and co-defendant's relationship as it impacted on co-defendant's credibility, could be demonstrated at trial by introduction of extrinsic evidence.

PARTIES INVOLVED

Petitioner, Kevin Rice, was the defendant in the Circuit Court of Cook County, appellant in the Appellate Court of Illinois, First Judicial District, appellee in the Supreme Court of Illinois, petitioner in the United States District Court for the Northern District of Illinois and petitioner-appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, People of the State of Illinois, was the plaintiff in the Circuit Court, appellee in the Appellate Court of Illinois, First Judicial District, appellant in the Supreme Court of Illinois, respondent in the United States District Court for the Northern District of Illinois and respondent-appellee in the Court of Appeals for the Seventh Circuit.

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The Opinion of the United States Court of Appeals for the Seventh Circuit, No. 01-3500, is attached as Appendix A to this Petition. It is reported at 339 F.3d 546 (7 Cir. 2003).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Kevin Rice, (hereafter, petitioner, or defendant), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the Order of the United States District Court for the Northern District of Illinois, denying defendant's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

JUDGMENT AND OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is set out as App. A and reported at 339 F.3d 546 (7 Cir. 2003).

JURISDICTIONAL STATEMENT

Jurisdiction in the District Court was based on 28 U.S.C. § 2254 (original jurisdiction--habeas corpus by person in State custody).

Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291, which provides that appeals from final orders of the District Courts shall be taken to the Court of Appeals, and on 28 U.S.C. § 2253, which provides that appeals from final orders of the District Courts denying habeas corpus shall be taken to the Court of Appeals.

The case was affirmed on August 6, 2003. A timely filed Petition for Rehearing was denied on September 30, 2003.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. § 1257(a) and Rules 10.1, 12.1 and 13.1 of this Court.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the U.S. Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the U.S. Constitution reads:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> "Section 1 ... No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws."

STATEMENT OF THE CASE

On June 13, 1989, defendant, Rice, and one, Pugh, were in a car stopped for a traffic violation. The car which defendant was driving had tinted windows. (Tr. 319) Officer Drozd testified at a pre-trial motion to suppress (and similarly at trial) that notwithstanding the fact that the car had tinted windows, the passenger Pugh rolled down the window, at which time Drozd was able to see defendant Rice pass a paper bag to Pugh, who stuffed it in his pants (Tr. 282, 283) and exited the car. (Tr. 12) The officer then patted Pugh down (Tr. 12), took the bag from Pugh and searched it. (Tr. 13, 15) Heroin was found in the bag.

At a pre-trial motion to suppress hearing, Pugh, Rice's co-defendant, testified that the bag containing contraband was in his (Pugh's) possession, in his underpants, for some two hours before police seized it. (Tr. 26-31) He denied it was handed to him by defendant.

Defendant Rice testified the police stopped the car, and he was ordered to get out of the car. (Tr. 37) He testified that Officers Cronin and Drozd had previously stopped him frequently, at random. (Tr. 39) He denied handing the bag to Pugh.

The trial court denied defendant's motion to suppress, and also denied defendant's motion for a severance.

At trial, the officer who testified at the motion hearing, again testified that he saw the co-defendant, Pugh, obtain the bag containing contraband from defendant, then place it in his pants.

Pugh, himself on trial, invoked his Fifth Amendment privilege against self-incrimination. Defendant moved to admit Pugh's prior sworn testimony because Pugh was legally unavailable. The trial court denied defendant's right to present at trial, in order to contradict the officer, the aforesaid co-defendant Pugh's testimony at the motion to suppress hearing.

On appeal, defendant asserted (among other issues), as he had in the trial court, that he was denied his Sixth and Fourteenth Amendment rights to present exculpatory evidence when the trial court excluded the prior testimony of his co-defendant, given under oath at a motion to suppress hearing, where the same factual issue existed both at the motion and at trial, where, at the prior hearing, the State had ample opportunity to cross-examine, and did cross-examine Pugh, where such testimony exculpated defendant.

The Illinois Appellate Court reversed, holding that under Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973), co-defendant's statement should have been admitted. The State proceeded to the Illinois Supreme Court, which reversed the Appellate Court, thus reinstating defendant's conviction and sentence.

After petitioner ultimately lost his State court appeal, he filed a petition for writ of habeas corpus in the District Court pursuant to 28 U.S.C. § 2254, asserting the unconstitutionality of the Illinois State court judgment under which he is being held in custody.

The District Court denied the habeas corpus petition but issued a certificate of appealability. The Court of Appeals for the Seventh Circuit (App. A) affirmed with one Judge dissenting. Petitioner's Petition for Rehearing en Banc was denied.

RAISING THE FEDERAL QUESTION BELOW

In the trial court, both during trial and in post-trial motions, defendant asserted that under the Sixth and Fourteenth Amendments to the United States Constitution, he had a right to present co-defendant's prior sworn testimony as exculpatory evidence. He again presented this issue to the Illinois Appellate and Supreme Courts. All three courts considered this issue.

The issue was then considered by the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING CERTIORARI

1.

The application by the Illinois Supreme Court of Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973) and Ohio v. Roberts, 448 U.S. 56 (1980), was unreasonable under 28 U.S.C. § 2254(d) when it excluded preliminary hearing testimony of a co-defendant who at trial invoked his Fifth Amendment right not to incriminate himself, where the issue at the preliminary hearing and at trial was essentially the same and where the prosecutor had the opportunity to and did cross-examine the witness at the preliminary hearing.

The majority, in reaching its decision, stated:

> "Before we decide the reasonableness of the Illinois Supreme Court's decision in this case, we note that we will not decide whether Pugh's suppression hearing testimony was in fact reliable enough to be admitted into evidence at Rice's trial. Our doing so would usurp the role of the state courts in determining the admissibility of evidence at trial under state law, which we are not permitted to do under AEDPA. *See Krenke*, 232 F.3d at 567. Instead, we may only consider whether it was unreasonable of the Illinois Supreme Court to

> hold, in light of *Chambers*, that the exclusion of Pugh's suppression hearing testimony did not violate Rice's due process right to present a defense and receive a fair trial. *Krenke*, 232 F.3d at 567." (App. 5)
>
> "Our review of the record in this case leads us to conclude that the disagreement among the Illinois state courts concerning the reliability of Pugh's statement, and the necessity for its admission at Rice's trial pursuant to *Chambers*, was reasonable." (App. 6)
>
> "The Illinois courts' dispute over the *Chambers'* factors reveals that reasonable minds can differ as to the proper application of the law to the facts of Rice's case. Ultimately, this is all that we need to recognize and defer to in deciding whether to grant Rice's request for habeas relief." (App. 7)

The error of the majority is that it seems to confuse hypothetical reasonableness with, in light of the Supreme Court's precedent (here), Chambers, supra, and Ohio v. Roberts, supra, actual unreasonableness.

As demonstrated by the dissent, the core of Chambers is the holding that: "[w]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (App. 8)

Implicitly, in evaluating Chambers, supra, under "AEDPA," the term "reasonably"- "may not be applied mechanistically to defeat the ends of justice" and that is what the majority has done.

As stated by the dissent, the Illinois Supreme Court's application of Chambers is unreasonable because:

> "When as in this case a person who has evidence to offer is not available to testify, testimony that he gave in another proceeding is admissible if the opposing party, in this case the state, 'had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination' in that proceeding. Fed. R. Evid. 804(b)(1). I am quoting from the Federal Rules of Evidence and they of course do not govern trials in state courts, but the formulation is standard and Illinois law (though common law rather than codified) is essentially the same. See *People v. Rice, supra*, 651 N.E.2d at 1085 ('it is well settled that the testimony of a witness at a prior hearing is admissible in evidence at trial where the witness is unavailable and when ample opportunity to cross-examine existed at the prior hearing'); *People v. Hawkins*, 762 N.E.2d 46, 55 (Ill. App. 2001); *People v. Taylor*, 679 N.E.2d 82, 86-87 (Ill. App. 1997). There is no requirement of corroboration. That is a

requirement of another hearsay exception, the one for statements against penal interest, Fed. R. Evid. 804(b)(3); *People v. McCallister*, 737 N.E.2d 196, 215 (Ill. 2000), which is also applicable to Pugh's testimony at the suppression hearing, see *People v. Rice, supra*, 651 N.E.2d at 1086-88, but which is unnecessary to consider, given the prior-testimony exception.

This is one of the solidest exceptions to the hearsay rule, see Ohio v. Roberts, 448 U.S. 56, 66 (1980), and a refusal to apply it in a criminal case presents a substantial issue under *Chambers*. The principal justification for the hearsay rule is that most hearsay statements, being made out of court, are not subject to cross-examination. *People v. Robinson*, 679 N.E.2d 1055, 1059-60 (N.Y. 1997). Hearsay statements made in court, albeit in a prior proceeding, do not suffer from that infirmity, provided that, as Rule 804(b)(1) puts it, the opposing party 'had an opportunity and similar motive to develop [or challenge--see Advisory Committee Note to Subdivision (b), Exception (1)] the testimony by ... cross ... examination.' And again Illinois law, as set forth in the state supreme court's decision upholding Rice's conviction, *People v. Rice, supra*, 651 N.E.2d at 1085-86, is the same." (App. 9-10)

* * *

"Had Pugh's testimony at the suppression hearing been believed, the motion to suppress the drug evidence would have been granted. The only evidence of probable cause to seize the drugs was the testimony of the police officer who claimed to have seen Pugh hand them to Rice, and his testimony would have been totally discredited had Pugh been believed. So the state had every incentive to cross-examine Pugh about his relation with Rice and any other circumstance that might make him less credible. And not only the incentive, but the right. As remarked in *People v. Rice*, under Illinois law cross-examination even at a preliminary hearing to determine probable cause for a search or seizure is not limited to the scope of the direct examination but includes 'such further interrogation as necessary to show interest, bias, prejudice, or motive of the witness, to the extent that these factors are relevant to the question of probable cause.' 651 N.E.2d at 1085. The Illinois supreme court's determination that because the suppression hearing focused on different issues from the trial the state didn't have the incentive or opportunity to test Pugh's reliability fully is, with all due respect, nonsense. The issues were different--probable cause to seize the drugs versus Rice's possession of them--but the

> incentive to destroy Pugh's credibility the same as it would have been had he testified at trial. If he were believed, the drugs should not have been seized *and* Rice was not guilty of possessing them." (App. 10-11)

* * *

> "The court based the exclusion of reliable evidence essential to give a criminal defendant a crack at acquittal on an irrational ground, the 'different issues' ground that as I have just explained was irrelevant to the pertinence and reliability of Pugh's evidence.... [t]he state supreme court's application of *Chambers* was unreasonable." (App. 12)

As stated by the dissent, the Illinois Supreme Court's application of this Court's opinions was unreasonable. Hence, this Petition for Writ of Certiorari should be granted.

2.

Defendant's Sixth and Fourteenth Amendment rights to present exculpatory evidence were violated when defendant was prevented from presenting crucial exculpatory evidence, the prior sworn testimony of a witness who was cross-examined by the prosecution at a pre-trial motion to suppress, and hence, the prosecutor had an opportunity and similar motive to cross-examine, because the real factual dispute both at pre-trial motion and at trial was the same: when the police arrived, did co-defendant have the bag of drugs secreted in his pants, or was it in defendant's hands being passed to co-defendant, and where any speculative inability of the prosecution at the motion to suppress, to demonstrate defendant and co-defendant's relationship as it impacted on co-defendant's credibility, could be demonstrated at trial by introduction of extrinsic evidence.

Four Justices of the Illinois Supreme Court, in a 4 to 3 opinion, held that defendant could not present co-defendant's prior sworn testimony at a motion to suppress hearing, where the prosecutor had an opportunity to and did cross-examine, because:

> "The focus of the cross-examination of codefendant at the suppression hearing ... was the conduct of codefendant just prior to the search, his self-interest in testifying falsely at the suppression hearing,... At trial however, the

> State's focus would be on the guilt or innocence of defendant--a much different issue than that presented at the suppression hearing--and any motive codefendant[1] might have in making exculpatory statements on behalf of defendant." (App. 21-22)

Hence, the majority concluded:

> "The issues at the suppression hearing and the purpose for which codefendant's testimony was later offered at defendant's trial are not so similar that we may say that the State had a meaningful opportunity to effectively cross-examine codefendant on the occasion his testimony was given." (App. 21)

This ruling is in conflict with opinions of this Court, upholding a defendant's due process right to present exculpatory evidence in support of his defense, Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019 (1967); and dicta in United States v. Salerno, 505 U.S 317, 120 L.Ed.2d 255, 112 S.Ct. 2503 (1992),[2] that

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[1]The court had reference to the witness and defendant allegedly being members in the same gang.

[2]In Salerno, this Court interpreted an analogous situation as regulated by Federal Rules of Evidence 804(b)(1). This Court did not decide the constitutional question herein presented.

defendant's constitutional right to present evidence is denied when at the prior hearing, the testimony was given under circumstances where the prosecutor had opportunity and similar motive to cross-examine.

Defendant was moving to introduce sworn testimony as distinct from mere hearsay as in Chambers. Hence, the points in Chambers do not control.

The Court in Chambers, in discussing what facts prove reliability, was referring to statements not under oath, as was the statement of one, McDonald, that defendant in Chambers sought to introduce. The Court stated:

> "A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination." 410 U.S. at 298-99, 35 L.Ed.2d at 311. (Emphasis added.)

The Court indicated that a different situation would exist if the statement had been made under oath--had been subject to cross-examination by an adverse party so his credibility could be tested. As it was, at bar. The Court stated:

> "The hearsay rule, which has long been recognized and respected by virtually every

> State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination ... A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination." 410 U.S. at 298, 35 L.Ed.2d at 310-11. (Emphasis added.)

Here: (a) the statement was made under oath; (b) the statement was against penal interest [if he testified at trial and denied possession, he could be impeached with the prior statement (Harris v. New York, 401 U.S. 222, 28 L.Ed.2d 1 (1971)]; (c) since the statement was under oath, there are "circumstances that impress the speaker with the solemnity of his statements" (410 U.S. at 298, 35 L.Ed.2d at 311) (fear of prosecution for perjury); (d) there was opportunity for cross-examination to a degree and scope necessary to test the credibility of the person testifying.

That the Illinois Supreme Court's decision is contrary to, and/or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States in Chambers v. Mississippi, supra, is evident when one considers analogous situations in other U.S. Supreme Court decisions.

In Ohio v. Roberts, 448 U.S. 56 (1980), the Court relied on Chambers, supra, and "careful[ly] compar[ed] ... this case [Roberts] to California v. Green[3]," Roberts, 448 U.S. at 64, 65 L.Ed.2d at 606, to hold that "competing interests ... may warrant dispensing with confrontation at trial," ibid., so as to permit admission of testimony given at prior proceedings between the parties. Id. at 66, 65 L.Ed.2d at 608. On the facts before it, the Roberts, Court ultimately held that prior cross-examination [or the functional equivalent thereof[4]] at the preliminary hearing by defendant's counsel, rendered the prior testimony--there, a sworn statement at preliminary hearing, against the penal interest of the declarant whose whereabouts were unknown at the time of defendant's trial--was sufficiently reliable, so that the State could use it against the defendant at trial without violating Fourteenth

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[3]399 U.S. 149, 26 L.Ed.2d 489 (1970).

[4]"[D]efense counsel in this case tested ... [the declarant's] testimony with the equivalent of significant cross-examination." Roberts, id. at 70, 65 L.Ed.2d at 610.

Amendment due process of law and/or defendant's Sixth Amendment confrontation rights.

In Bourjaily v. United States, 483 U.S. 171, 97 L.Ed.2d 144 (1987), the Court held that there is sufficient reliability under the Confrontation Clause of the Sixth Amendment to the United States Constitution to allow admission of an extrajudicial statement, where the statement of the out-of-court declarant satisfies the requirements of an exception to the hearsay rule--i.e., there, F.R.E. 801(d)(2)(E) ("co-conspirator" exception to hearsay rule).

In United States v. Salerno, 505 U.S. 317, 120 L.Ed.2d 255 (1992), the Court held there is sufficient reliability for admission under F.R.E. 804(b)(1), where the prior cross-examination occurred with similar motive on the part of the cross-examiner to discredit the declarant. That is precisely the situation here.

The crucial issue on the motion to suppress was the factual issue whether the bag was in Pugh's pants for hours before the police came, i.e., it was not visible to the police, i.e., did the police see Rice hand the bag to Pugh? This was the crucial issue because, if this was not really seen by the police, there was no basis to pat down Pugh. [A police officer can pat down an unarrested citizen only if there are articulable facts indicating the person is armed. Terry v. Ohio, 392 U.S. 1, 27, 20 L.Ed.2d 889, 909 (1968); United States v. Wheeler, 800 F.2d 100 (7 Cir. 1986).]

The crucial issue as to defendant Rice, at trial, is the same factual issue, i.e., was the bag in Pugh's pants long before the police arrived, i.e., did the police see Rice hand the bag to Pugh? Hence, both at the motion hearing and at trial, the crucial issue of **FACT** was the **SAME**. Since this factual issue was common to both the suppression hearing and the trial, it is clear that at both these proceedings--at the suppression hearing, and at the trial--the interest and motive of the State would be to seek to prove that Pugh was lying.

The prosecution had a meaningful opportunity to, and did, cross-examine on the real factual issue: i.e., where was the bag when the police arrived?

The Illinois Supreme Court Opinion is wrong and an unreasonable application of this Court's decisions in Chambers v. Mississippi, supra, and Ohio v. Roberts, supra, because here (1) the excluded evidence is very exculpatory; (2) at the motion to suppress hearing, the prosecutor had a similar motive to discredit the witness's statement and credibility, and (3) any slight lack of ability to discredit the co-defendant can be alleviated by presenting extrinsic evidence to the jury of the relationship between defendant and co-defendant.

The prosecution's right to demonstrate the co-defendant's interest and bias was not diminished, because at trial, as at sentencing, the prosecution was able to present extrinsic evidence as to the relationship between defendant and co-defendant. It is not

uncommon for such evidence to be presented, not by cross-examination of defendant and co-defendant, but by means of extrinsic evidence. See, for example, United States v. Abel, 469 U.S. 45, 83 L.Ed.2d 450 (1984) (bias and interest can be shown by membership of defendant and witness in same gang).

Here, because the prosecution was able to advise the jury of the nature, character and credibility of the witness (cf. Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674 (1986)), the difference between cross-examination at a motion to suppress and at a trial does not mean that the prosecution did not have "similar motive and opportunity."

Furthermore, just as a limitation of a defendant's right to cross-examine a witness on interest and bias does not substantially negate his right to a fair trial, "as long as the jury receives sufficient information to appraise the bias and motivation of the witness," Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674 (1986); accord, United States v. Carn, 18 F.3d 738 (9 Cir. 1994); United States v. Baptista-Rodrigues, 17 F.3d 1354 (11 Cir. 1994), so too, defendant's right to present exculpatory evidence must be superior to any slight limitation on a prosecutor's right to cross-examine witnesses--a right not as broad as defendant's right of confrontation--where any limitation can be cured by the prosecutor's ability to present extrinsic evidence of interest and bias, and where the prosecutor had a

meaningful right to cross-examine on the real factual dispute.

Hence, the exclusion of co-defendant's sworn testimony violated defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution, and the Illinois Supreme Court's application of Chambers, supra is unreasonable. This Court should grant this Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 01-3500

KEVIN RICE,

Petitioner-Appellant,

v.

TERRY MCCANN, Warden,
Centralia Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 00 C 3997—**Suzanne B. Conlon**, *Judge.*

ARGUED APRIL 18, 2002—DECIDED AUGUST 6, 2003

Before FLAUM, *Chief Judge*, and HARLINGTON WOOD, JR., and POSNER, *Circuit Judges.*

FLAUM, *Chief Judge.* In 1992 Kevin Rice was convicted in the Circuit Court of Cook County of possession of heroin with intent to deliver and sentenced to 20 years' imprisonment. His state court remedies exhausted, Rice petitioned the federal district court for a writ of habeas corpus under 28 U.S.C. § 2254. He now appeals the court's denial of his habeas petition, arguing that he is entitled to post-conviction relief based on the Illinois Supreme Court's unreasonable application of *Chambers v. Mississippi*, 410 U.S. 284 (1973), to his case. We affirm.

I. BACKGROUND

In 1989 two Chicago police officers, Robert Drozd and Michael Cronin, observed a car with tinted windows drive by their unmarked police car traveling 40 miles-per-hour in a 30 miles-per-hour speed zone. The officers pulled the speeding car over, and Drozd approached the vehicle on the driver's side. Through the car's open window, Officer Drozd saw the driver, petitioner Rice, hand a brown paper bag to the passenger, Raymond Pugh; Drozd then watched Pugh stuff the bag down the front of his pants. Believing the bag to contain a weapon, Drozd ordered Pugh out of the car and conducted a pat-down search. Drozd recovered the bag and found what appeared to be an illegal substance inside (lab tests later showed that the bag contained 103 grams of heroin). Drozd placed Pugh under arrest and told Officer Cronin about the transfer of the bag; Cronin then arrested Rice.

Before Rice and Pugh were tried, Pugh moved to quash his arrest and suppress evidence obtained from Drozd's search. At the suppression hearing, Pugh testified that he had placed the paper bag containing the heroin down his pants two hours before he and Rice were stopped by Officers Drozd and Cronin. Pugh also stated that he had kept the bag in his pants at all times until Drozd discovered it during the pat-down search. At Rice and Pugh's trial, Officer Drozd testified that as he approached the stopped car he saw Rice hand Pugh the paper bag and watched Pugh put the bag down his pants. Rice denied handling the bag or the heroin and called Pugh to testify that he put the bag down his pants two hours earlier. When Pugh asserted his fifth amendment privilege, Rice moved to admit Pugh's statements from the suppression hearing. The trial judge denied the motion, ruling that Pugh's paper bag testimony was inadmissible hearsay because the issues presented at the suppression hearing were

not similar enough to the ones at trial to ensure that the State had a meaningful opportunity to cross-examine Pugh.

The jury ultimately convicted Rice of possession with intent to deliver heroin, and the court sentenced him to a 20-year prison term. Rice appealed his conviction, arguing that the court committed prejudicial error by refusing to admit Pugh's suppression hearing testimony at trial. Rice won an initial victory in the Illinois appellate court, *People v. Rice*, 617 N.E.2d 360, 363-64 (Ill. App. Ct. 1993), but a divided Illinois Supreme Court reinstated his conviction, *People v. Rice*, 651 N.E.2d 1083, 1088 (Ill. 1995).

The Illinois appellate court held that Pugh's statements at the suppression hearing were statements against his penal interest and should have been admitted as an exception to hearsay. *Rice*, 617 N.E.2d at 362. The appellate court examined Pugh's prior statements for indicia of reliability using the framework set forth in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), and decided that Pugh's testimony satisfied three of the four requirements for admission. *Rice*, 617 N.E.2d at 363 (finding that Pugh's former testimony was (1) corroborated by other evidence, (2) against his penal interests, and (3) subject to cross-examination, but was not (4) made to a close acquaintance shortly after the crime).

The Illinois high court disagreed, holding that the trial court's exclusion of Pugh's former testimony was proper under the state's evidentiary rules and did not deny Rice a fair trial under the rule announced in *Chambers*. *Rice*, 651 N.E.2d at 1087-88. A majority of the Supreme Court of Illinois found that Pugh's statements may have been against his penal interests, but were not made spontaneously to an acquaintance, were not corroborated by any other evidence, and were not subject to adequate cross-examination because the issues at stake in the suppression hearing were limited and the State was not permit-

ted "to fully test the testimony's reliability." *Rice*, 651 N.E.2d at 1087.

Rice timely filed his application for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254, tendering six separate grounds for relief. *See Rice v. Bowen*, No. 00 C 3997, 2001 WL 1035262 (N.D. Ill. 2001). The district court rejected all of his reasons and denied his habeas petition. On appeal Rice makes only one argument: that the Illinois Supreme Court unreasonably applied *Chambers*, and violated his constitutional right to due process, in deciding that the trial court had properly excluded Pugh's suppression hearing testimony at Rice's trial.

II. Discussion

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a habeas petitioner like Rice whose claim was adjudicated on the merits in state court is not entitled to relief unless he can demonstrate that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Price v. Vincent*, 123 S.Ct. 1848, 1852 (2003). The Supreme Court also warns that under AEDPA we are not at liberty to issue a writ of habeas corpus based on our "independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000); *Morgan v. Krenke*, 232 F.3d 562, 565-66 (7th Cir. 2000). For our purposes here, that means we must uphold the Illinois Supreme Court's application of *Chambers* (for there is no dispute

that this is the correct governing legal principle) to Rice's case unless it was objectively unreasonable. 28 U.S.C. § 2254(d)(1); *Edmunds v. Deppisch*, 313 F.3d 997, 999 (7th Cir. 2002); *Williams*, 529 U.S. at 404-05. We have said in other habeas proceedings that a state court's application of federal law is reasonable where it is "at least minimally consistent with the facts and circumstances of the case." *Sanchez v. Gilmore*, 189 F.3d 619, 623 (7th Cir. 1999). *Cf. Williams*, 529 U.S. at 410 (acknowledging that "unreasonable" is difficult to define, but noting that "it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning").

Before we decide the reasonableness of the Illinois Supreme Court's decision in this case, we note that we will not decide whether Pugh's suppression hearing testimony was in fact reliable enough to be admitted into evidence at Rice's trial. Our doing so would usurp the role of the state courts in determining the admissibility of evidence at trial under state law, which we are not permitted to do under AEDPA. *See Krenke*, 232 F.3d at 567. Instead, we may only consider whether it was unreasonable of the Illinois Supreme Court to hold, in light of *Chambers*, that the exclusion of Pugh's suppression hearing testimony did not violate Rice's due process right to present a defense and receive a fair trial. *Krenke*, 232 F.3d at 567.

Chambers informs us that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* 410 U.S. at 302. The *Chambers* Court provided four factors to consider in determining whether sufficient indicia of reliability exist to admit exculpatory hearsay into evidence: (1) whether the statement was made shortly after the crime to a close acquaintance, (2) whether other evidence or circumstances corroborate the statement, (3) whether the statement was self-

incriminatory and against the declarant's penal interests, and (4) whether the declarant was subject to adequate cross-examination. *Id.* at 300-01. Rice contends that the Illinois Supreme Court unreasonably applied *Chambers* because Pugh's suppression hearing testimony "bore persuasive assurances of trustworthiness and thus was well within the rationale of the exception for declarations against interest." *Chambers*, 410 U.S. at 302. *See also People v. Rice*, 617 N.E.2d 360, 363 (Ill. App. Ct. 1993) (finding Pugh's prior statement trustworthy as it satisfies three of four *Chambers* factors). The State maintains there was nothing unreasonable about the Illinois Supreme Court's decision: the court identified *Chambers* as the correct governing principle of law, considered Pugh's prior statements in light of the reliability factors identified in *Chambers*, and logically concluded that Pugh's suppression hearing testimony was properly excluded at trial because it was untrustworthy and did not qualify under any hearsay exception. The federal district court considered these conflicting interpretations in reviewing Rice's habeas petition and decided the Illinois Supreme Court's application of *Chambers* was consistent with the facts and circumstances of Rice's case and was therefore not unreasonable. *Rice*, 2001 WL 1035262, at *3.

Our review of the record in this case leads us to conclude that the disagreement among the Illinois state courts concerning the reliability of Pugh's statement, and the necessity for its admission at Rice's trial pursuant to *Chambers*, was reasonable. There is no doubt that Pugh's testimony at the suppression hearing—that he alone had possession of the heroin—is the kind of exculpatory (to Rice) hearsay that *Chambers* held could not be automatically excluded by operation of the rules of evidence. The Illinois courts agreed on two of the four *Chambers* reliability indicators: (1) that Pugh's testimony was not made shortly after the crime to a close acquaintance,

and (2) that the testimony was a statement made against Pugh's penal interests. But the courts disagreed on the remaining two factors: (3) whether corroborating evidence existed to support Pugh's version of events; and (4) whether the state had adequate opportunity to cross-examine Pugh at the suppression hearing. In particular, the Illinois appellate court decided that several facts and circumstances, including Pugh's close relationship with Rice, the voluntariness of his testimony, the lack of inconsistencies in his story compared with other versions of the stop and search, the lack of evidence that Pugh wanted to curry favor with the prosecution, and the fact that Pugh's statements were made under oath and could be used to impeach him at trial, all suggest that Pugh had no motive to fabricate his testimony. But the Illinois Supreme Court looked at the circumstances differently, stating without reference to the appellate court's analysis that there was no evidence corroborating Pugh's statements, and also finding that the prosecution did not have an adequate opportunity to cross-examine Pugh. The high court reasoned that because Pugh's suppression hearing focused on different issues than Rice's trial, the State could not have fully tested Pugh's reliability. Though we may disagree, knowing of no Illinois rule of evidence that restricts exploration of a witness's veracity or motive on cross-examination regardless of the substantive scope of the direct examination, our resolution of this point is neither called for nor permitted on habeas review.

The Illinois courts' dispute over the *Chambers'* factors reveals that reasonable minds can differ as to the proper application of the law to the facts of Rice's case. Ultimately, this is all that we need to recognize and defer to in deciding whether to grant Rice's request for habeas relief. For even if the Illinois Supreme Court's application of *Chambers* was not unassailable, as shown by the contrary inferences drawn by the Illinois appellate court using

the same law and the same facts, by the same logic it also was not unreasonable. *Chambers* instructs courts to avoid mechanically applying evidentiary rules where such application would result in the exclusion of critical evidence and the violation of a criminal defendant's due process rights. We cannot conclude that the Illinois Supreme Court unreasonably applied this principle of law to its analysis of Pugh's excluded hearsay testimony and the impact of the excluded testimony on Rice's constitutional right to a fair trial.

III. CONCLUSION

The Illinois Supreme Court's decision upholding the trial court's exclusion of certain hearsay testimony from Rice's trial did not involve an unreasonable application of *Chambers v. Mississippi* and therefore does not justify habeas relief in federal court. The district court's denial of Rice's petition for a writ of habeas corpus is AFFIRMED.

POSNER, *Circuit Judge*, dissenting. The U.S. Supreme Court held in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." With all due respect to the contrary view of my colleagues, it seems me that this is just what the Supreme Court of Illinois did in this case.

A police officer testified that he saw Kevin Rice hand Raymond Pugh a bag later discovered to contain heroin. On the basis of this testimony—and nothing else—Rice was

convicted in an Illinois state court of possession of an illegal drug and sentenced to a long term in prison. At a pretrial hearing on his motion to suppress the evidence consisting of the heroin, Pugh testified that Rice had not handed him the bag; that he had had it on his person for hours. At trial, Rice wanted to call Pugh as a witness; but Pugh, invoking his right not to be compelled to incriminate himself, refused to testify. So Rice sought to introduce in evidence the part of the transcript of the suppression hearing that recorded Pugh's testimony, testimony that if believed would exonerate Rice of the charge of possession. This was refused. The state supreme court's reasons for upholding the refusal were that Pugh's testimony was not corroborated and that the state had not had an opportunity to cross-examine him fully at the suppression hearing. *People v. Rice*, 651 N.E.2d 1083, 1085-88 (Ill. 1995).

When as in this case a person who has evidence to offer is not available to testify, testimony that he gave in another proceeding is admissible if the opposing party, in this case the state, "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" in that proceeding. Fed. R. Evid. 804(b)(1). I am quoting from the Federal Rules of Evidence and they of course do not govern trials in state courts, but the formulation is standard and Illinois law (though common law rather than codified) is essentially the same. See *People v. Rice*, *supra*, 651 N.E.2d at 1085 ("it is well settled that the testimony of a witness at a prior hearing is admissible in evidence at trial where the witness is unavailable and when ample opportunity to cross-examine existed at the prior hearing"); *People v. Hawkins*, 762 N.E.2d 46, 55 (Ill. App. 2001); *People v. Taylor*, 679 N.E.2d 82, 86-87 (Ill. App. 1997). There is no requirement of corroboration. That is a requirement of another hearsay exception, the one for statements against penal interest,

Fed. R. Evid. 804(b)(3); *People v. McCallister*, 737 N.E.2d 196, 215 (Ill. 2000), which is also applicable to Pugh's testimony at the suppression hearing, see *People v. Rice*, *supra*, 651 N.E.2d at 1086-88, but which is unnecessary to consider, given the prior-testimony exception.

This is one of the solidest exceptions to the hearsay rule, see *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), and a refusal to apply it in a criminal case presents a substantial issue under *Chambers*. The principal justification for the hearsay rule is that most hearsay statements, being made out of court, are not subject to cross-examination. *People v. Robinson*, 679 N.E.2d 1055, 1059-60 (N.Y. 1997). Hearsay statements made in court, albeit in a prior proceeding, do not suffer from that infirmity, provided that, as Rule 804(b)(1) puts it, the opposing party "had an opportunity and similar motive to develop [or challenge—see Advisory Committee Note to Subdivision (b), Exception (1)] the testimony by . . . cross . . . examination." And again Illinois law, as set forth in the state supreme court's decision upholding Rice's conviction, *People v. Rice*, *supra*, 651 N.E.2d at 1085-86, is the same. An auxiliary justification for the hearsay rule, but one whose validity has been strongly challenged, see Michael J. Saks, "Enhancing and Restraining Accuracy in Adjudication," 51 *L. & Contemp. Probs.*, Autumn 1988, pp. 243, 263-64, is that the trier of fact cannot observe the demeanor of the absent declarant.

Had Pugh's testimony at the suppression hearing been believed, the motion to suppress the drug evidence would have been granted. The only evidence of probable cause to seize the drugs was the testimony of the police officer who claimed to have seen Pugh hand them to Rice, and his testimony would have been totally discredited had Pugh been believed. So the state had every incentive to cross-examine Pugh about his relation with Rice and any other circumstance that might make him less credible. And not only the incentive, but the right. As remarked

in *People v. Rice*, under Illinois law cross-examination even at a preliminary hearing to determine probable cause for a search or seizure is not limited to the scope of the direct examination but includes "such further interrogation as necessary to show interest, bias, prejudice, or motive of the witness, to the extent that these factors are relevant to the question of probable cause." 651 N.E.2d at 1085. The Illinois supreme court's determination that because the suppression hearing focused on different issues from the trial the state didn't have the incentive or opportunity to test Pugh's reliability fully is, with all due respect, nonsense. The issues were different—probable cause to seize the drugs versus Rice's possession of them—but the incentive to destroy Pugh's credibility the same as it would have been had he testified at trial. If he were believed, the drugs should not have been seized *and* Rice was not guilty of possessing them.

It is not as if the Illinois court had found that the prosecutor at the suppression hearing in fact lacked an incentive to cross-examine Pugh fully. Rather, the court *automatically* equated a difference in issues to a difference in incentives to cross-examine. Here is the key passage in the opinion: "[T]he question presented at codefendant's suppression hearing dealt with whether Officer Drozd saw codefendant [i.e., Pugh] tuck a brown paper bag into his pants after defendant's car was stopped, giving the officer probable cause to search codefendant. The focus of the cross-examination of codefendant at the suppression hearing therefore was the conduct of codefendant just prior to the search, his self-interest in testifying falsely at the suppression hearing, and the issues presented by the motion to suppress. At trial however, the State's focus would be on the guilt or innocence of defendant—a much different issue than that presented at the suppression hearing—and any motive codefendant might have in making exculpatory statements on behalf of defendant." *Id.*

at 1086. The issues were different from a legal standpoint, but they were not different so far as the relevance of Pugh's testimony was concerned. Any motive he might have had for trying to exculpate Rice would, by undermining that testimony, strengthen the state's case that Rice gave Pugh the heroin and *therefore* was guilty of illegal possession.

The court based the exclusion of reliable evidence essential to give a criminal defendant a crack at acquittal on an irrational ground, the "different issues" ground that as I have just explained was irrelevant to the pertinence and reliability of Pugh's evidence. Because the state supreme court's application of *Chambers* was unreasonable and the error not a harmless one, as in the otherwise rather similar case of *People v. Hawthorne*, 841 P.2d 118, 125-28 (Cal. 1992), Rice is entitled to a new trial.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 30, 2003

Before

Hon. Joel M. Flaum, *Chief Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*
Hon. Richard A. Posner, *Circuit Judge*

KEVIN RICE,	) Appeal from the
	) United States
Petitioner-Appellant,	) District Court
	) for the Northern
No. 01-3500	) District of
	) Illinois, Eastern
vs.	) Division.
	)
TERRY McCANN,	)
Warden, Centralia	) No. 00 C 3997
Correctional Center,	)
	) Suzanne B. Conlon
Respondent-Appellee.	) *Judge.*

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-entitled

case on August 19, 2003, by petitioner-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX C

FILED
APR 20 1995
SUPREME COURT CLERK

SUPREME COURT OF ILLINOIS

Docket No. 75689--Agenda 7--May 1994.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant, v. KEVIN RICE, Appellee.

JUSTICE MILLER delivered the opinion of the court:

Following a jury trial in the circuit court of Cook County, defendant, Kevin Rice, was convicted of possession of a controlled substance with intent to deliver (Ill. Rev. Stat. 1985, ch. 56½, par. 1401(a)(1)). He was subsequently sentenced to 20 years' imprisonment. The appellate court reversed defendant's conviction, finding that the trial court erred in refusing to admit into evidence a codefendant's exculpatory testimony made at a pretrial suppression hearing. (247 Ill. App. 3d 415.) We allowed the State's petition for leave to appeal (145 Ill. 2d R. 315(a)) and now reverse the judgment of the appellate court.

Facts

The following evidence was adduced at the joint

trial of defendant and codefendant, Raymond Pugh. On June 13, 1989, at 8:30 p.m., Chicago police officers Robert Drozd and Michael Cronin were driving in an unmarked police car northbound on Sacramento Avenue in Chicago. The officers were accompanied by Pat Law, an investigator from the Cook County State's Attorney's office. A Nissan vehicle with tinted windows subsequently passed the unmarked police car. Officer Drozd testified that he believed the vehicle was traveling about 40 miles per hour in a 30-mile-per-hour zone.

The officers followed the vehicle through the intersection of Sacramento Avenue and Madison Street. Officer Cronin then motioned for the driver of the Nissan to pull over. After the driver complied, both officers exited the police car. Officer Drozd approached the passenger side of the Nissan vehicle, while Officer Cronin approached the driver's side.

Officer Drozd testified that the passenger window was rolled down. As he approached the vehicle, Officer Drozd, through the open passenger window, observed defendant, the driver of the vehicle, hand codefendant a brown paper bag, which codefendant tucked inside his pants. Codefendant, who was seated in the passenger seat, then exited the vehicle. Believing the bag to contain a weapon, Officer Drozd conducted a patdown search of codefendant and recovered the bag from codefendant's pants. The bag contained a white, chunky substance, later identified as approximately 103 grams of heroin. Officer Drozd then

placed codefendant under arrest.

While the preceding events were occurring, Officer Cronin was with defendant, who had stepped out of the car on the driver's side. Officer Drozd informed Officer Cronin that he had observed defendant hand the paper bag to codefendant. Officer Cronin then placed defendant under arrest.

After the State rested its case, defendant's counsel attempted to call codefendant as a witness. Codefendant invoked his fifth amendment privilege against self-incrimination and refused to testify. (U.S. Const., amend. V; see also Ill. Const. 1970, art. I, §10.) Prior to trial, however, codefendant had testified in a hearing on a motion filed on his behalf to quash arrest and suppress evidence. During the hearing on his suppression motion, codefendant testified that he had placed the paper bag containing the contraband inside his pants about two hours before the police stopped the car. Because codefendant asserted his fifth amendment right to refuse to testify at trial, defense counsel moved to admit into evidence the testimony given by codefendant at the suppression hearing that was exculpatory of defendant. The trial judge ruled that the testimony was inadmissible because the issues at the suppression hearing and at trial were not similar enough to assure that the State had a meaningful opportunity to cross-examine codefendant at the time the testimony was given. Defendant was subsequently convicted of possession of a controlled substance with intent to deliver and was sentenced to a 20-year prison term.

On appeal to the appellate court, defendant argued, among other things, that the trial judge erred in refusing to admit codefendant's suppression hearing testimony. The appellate court agreed, finding that codefendant's testimony was properly admissible under Federal Rule of Evidence 804(b)(3), the statement-against-interest exception to the hearsay rule. Accordingly, the appellate court reversed defendant's conviction and remanded the cause for a new trial. (247 Ill. App. 3d at 417-19.) We allowed the State's petition for leave to appeal (145 Ill. 2d R. 315(a)) and, for the reasons that follow, reverse the judgment of the appellate court.

Discussion

Before this court, the State initially contends that the appellate court improperly adopted Rule 804(b)(3). It further argues that the appellate court erred in finding codefendant's suppression hearing testimony admissible. Specifically, the State contends that codefendant's suppression hearing testimony is inadmissible hearsay and does not fall within the statement-against-interest or the former-testimony exception to the hearsay rule, the two exceptions advanced by defendant in urging the trial court's admission of the testimony.

We first consider the State's argument that codefendant's suppression hearing testimony is not admissible under the former-testimony exception to the hearsay rule. It is well settled that the testimony of a witness at a prior hearing is admissible in evidence at

trial where the witness is unavailable and when ample opportunity to cross-examine existed at the prior hearing. (People v. Horton (1976), 65 Ill. 2d 413, 416; People v. Tennant (1976), 65 Ill. 2d 401, 411.) It is the second element which serves as the focal point of the dispute in this case. As this court has stated, determining whether ample opportunity to cross-examine at the prior hearing exists does not lend itself to a per se determination, but must be decided on the circumstances of each case. See Horton, 65 Ill. 2d at 417.

In applying the former testimony exception to testimony elicited at a preliminary hearing, this court has recognized the distinction between the opportunity to cross-examine afforded at trial and at a preliminary hearing. "'A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.'" (Horton, 65 Ill. 2d at 416, quoting Barber v. Page (1968), 390 U.S. 719, 725, 20 L. Ed. 2d 255, 260, 88 S. Ct. 1318, 1322; see also People ex rel. Daley v. Moran (1983), 94 Ill. 2d 41, 48.) Cross-examination at a preliminary hearing is subject to the general rule that questioning may not extend beyond the scope of the direct examination and such further interrogation as necessary to show interest, bias, prejudice, or motive of the witness, to the extent that these factors are relevant to the question of probable cause. Horton, 65 Ill. 2d at 416-17.

In view of the limited nature of the evidence that may be introduced at a preliminary hearing, this court has stated that whether adequate opportunity to cross-examine existed at a preliminary hearing "may not depend in its entirety on what transpired at that hearing." (Horton, 65 Ill. 2d at 417.) "Adequate opportunity to cross-examine means an opportunity to effectively cross-examine ***." (Horton, 65 Ill. 2d at 417.) Merely providing some opportunity to cross-examine at a preliminary hearing does not necessarily establish that the party had an adequate opportunity. (Horton, 65 Ill. 2d at 417.) Because a suppression hearing is even more limited in focus than a preliminary hearing, the reasoning in Horton is equally applicable to the present case.

At the outset, we note that there is no dispute that the State had an opportunity to cross-examine codefendant at the suppression hearing. The key question is whether that opportunity provided a means to effectively cross-examine codefendant. The State argues that it did not have an opportunity to effectively cross-examine codefendant at the suppression hearing because it did not have the motive to question codefendant regarding the nature of his relationship with defendant, which might have prompted codefendant to testify falsely. The State further contends that had codefendant testified at trial it would have inquired into the existence of such a relationship. Because of the limited nature of the suppression hearing and the State's limited focus at the proceeding, we agree that the State did not have an adequate opportunity to effectively

cross-examine codefendant. Without such an opportunity, codefendant's testimony at the suppression hearing was properly denied admission under the former-testimony exception to the hearsay rule.

For an opportunity to cross-examine to be considered meaningful, and therefore adequate and effective, the motive and focus of the cross-examination at the time of the initial proceeding must be the same or similar to that which guides the cross-examination during the subsequent proceeding. (Cf. Fed. R. Evid. 804(b)(1).) In the present case, the question presented at codefendant's suppression hearing dealt with whether Officer Drozd saw codefendant tuck a brown paper bag into his pants after defendant's car was stopped, giving the officer probable cause to search codefendant. The focus of the cross-examination of codefendant at the suppression hearing therefore was the conduct of codefendant just prior to the search, his self-interest in testifying falsely at the suppression hearing, and the issues presented by the motion to suppress. At trial however, the State's focus would be on the guilt or innocence of defendant--a much different issue than that presented at the suppression hearing--and any motive codefendant might have in making exculpatory statements on behalf of defendant. The issues at the suppression hearing and the purpose for which codefendant's testimony was later offered at defendant's trial are not so similar that we may say that the State had a meaningful opportunity to effectively cross-examine codefendant on the occasion his testimony was given. (Cf. United States v. Wingate (2d Cir. 1975),

520 F.2d 309, 316; see also United States v. Miller (D.C. Cir. 1990), 904 F.2d 65, 68; 2 J. Strong, McCormick on Evidence §304, at 315 (4th ed. 1992) ("similar motive" requires, "[a]t most, the issue on which the testimony was offered in the first [proceeding] must be the same as the issue upon which it is offered in the second"); 5 J. Wigmore, Evidence §1387, at 91 (Chadbourn rev. ed. 1974) ("The issue on the occasion when the former testimony or deposition was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested for cross-examination upon the point now in issue" (emphasis omitted)).) As previously noted, without such an opportunity, codefendant's testimony could not be admitted under the former-testimony exception.

We also reject the argument that codefendant's suppression hearing testimony was admissible under the statement-against-penal-interest exception to the hearsay rule. As to this issue, the State initially contends that the appellate court improperly adopted Rule 804(b)(3). Rule 804(b)(3) permits the admission of:

> "A statement which was at the time of its making *** so far tended to subject the declarant to civil or criminal liability, *** that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered

> to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." (Fed. R. Evid. 804(b)(3).)

The State maintains that this court, in determining the admissibility of declarations against penal interest, has specifically chosen not to adopt this rule. Rather, the State contends that this court has adopted the "objective indicia of trustworthiness" analysis employed in Chambers v. Mississippi (1973), 410 U.S. 284, 300-01, 35 L. Ed. 2d 297, 311-12, 93 S. Ct. 1038, 1048-49, and used most recently by this court in analyzing a similar issue in People v. Cruz (1994), 162 Ill. 2d 314, 342-47. (See also People v. House (1990), 141 Ill.2d 323, 389-90; People v. Sanchez (1989), 131 Ill. 2d 417, 423-24.) Because we find that codefendant's suppression hearing testimony would be inadmissible under either Chambers or Rule 804(b)(3), we need not address the State's initial argument that the appellate court erroneously adopted the rule.

To reach this conclusion, we first examine the requirements for admission of a statement against penal interest under Rule 804(b)(3) and Chambers. Rule 804(b)(3) requires that three conditions be met before a statement will be admitted under this rule: (1) the declarant must be unavailable, (2) the declarant's statement must have been against penal interest, and (3) corroborating circumstances support the trustworthiness of the statement. (See United States v. Garcia (7th Cir. 1993), 986 F.2d 1135, 1139.) As to the latter

requirement, neither Rule 804(b)(3) nor the notes accompanying the rule elaborate on what constitutes "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement." (Fed. R. Evid. 804(b)(3).) The advisory notes do indicate, however, that "[t]he requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication," thus ensuring the statement's reliability. See Fed. R. Evid. 804(b)(3), Advisory Committee's Note.

Under Chambers, the statement at issue must be against the declarant's interest, and the statement must be accompanied by sufficient indicia of reliability to be admitted. (See People v. Cruz (1994), 162 Ill. 2d 314, 342-47.) Chambers does not specify the indicia of reliability that must be present in order for a statement to be admitted. See People v. Bowel (1986), 111 Ill. 2d 58, 67.

Although the parties dispute whether codefendant's statement was against his penal interest, we can assume for purposes of this opinion that codefendant's statement was against his penal interest and, for a Rule 804(b)(3) analysis, that codefendant was also unavailable, having asserted his fifth amendment right not to testify. We therefore need only discuss the requirement under Rule 804(b)(3) and Chambers that in order for the statement to be admissible sufficient circumstances exist to demonstrate the trustworthiness of the testimony given by codefendant at the hearing on his motion to suppress.

Defendant maintains that codefendant's suppression hearing testimony was trustworthy because it was against codefendant's penal interest, was under oath, and was subject to cross-examination. As previously explained, however, the focus and purpose of the State's cross-examination of codefendant at the suppression hearing was limited, and thus the State was not able to fully test the testimony's reliability. It therefore cannot be said that the fact codefendant was subject to cross-examination assures the testimony's reliability. 5 J. Wigmore, Evidence §1387, at 90 (Chadbourn rev. ed. 1974) ("Unless the issues were then the same as they are when the former statement is offered, the cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies and falsehoods" (emphasis in original)).

Moreover, the absence of several other factors further supports our conclusion that codefendant's testimony was not sufficiently trustworthy to be admitted. Codefendant's testimony was not a spontaneous statement to a close acquaintance, as suggested by Chambers, but was elicited through questioning at the pretrial motion to suppress, held approximately 22 months after the seizure at issue. Further, we note that codefendant had a motive to testify falsely. Codefendant stood to benefit at the suppression hearing by making the statement in question because, if his testimony had been believed, his motion would have been granted and the evidence against him suppressed.

Additionally, codefendant's statement that he placed the bag in his pants two hours prior to being stopped was not corroborated by any other evidence. Because we believe that there was insufficient indicia of reliability of codefendant's testimony at the suppression hearing, we find it inadmissible at trial under either Chambers or Rule 804(b)(3).

Conclusion

For the foregoing reasons, we find that the trial court did not abuse its discretion in excluding at trial codefendant's suppression hearing testimony. Accordingly, the judgment of the appellate court is reversed. Because of its ruling on the admissibility of codefendant's testimony, the appellate court did not address additional arguments raised by defendant. We therefore remand the cause to the appellate court for consideration of the remaining issues.

Appellate court reversed;
cause remanded.

JUSTICE HARRISON, dissenting:

I agree with the appellate court that the admission made by Pugh at the suppression hearing was admissible at trial. Generally, a third party's extrajudicial declarations, not made under oath, that he committed a crime are purely hearsay and are inadmissible, even though they are declarations against interest. (People v. Tate (1981), 87 Ill. 2d 134, 143.)

When justice requires, however, such extrajudicial declarations may be admissible under the statement-against-penal-interest exception to the hearsay rule if there are sufficient indicia of trustworthiness. (People v. Bowel (1986), 111 Ill. 2d 58, 66.) The United States Supreme Court so recognized in Chambers v. Mississippi (1973), 410 U.S. 284, 302, 35 L. Ed. 2d 297, 313, 93 S. Ct. 1038, 1049.

Under Chambers, the availability of a witness is not an essential element in determining the admissibility of a statement against interest. (See also People v. Morris (1986), 148 Ill. App. 3d 471; M. Graham, Cleary & Graham's Handbook of Illinois Evidence §804.7, at 783 (6th ed. 1994).) The critical inquiry is whether the statement was made under circumstances that ensure its trustworthiness. In Chambers, there were sufficient indicia of trustworthiness in that (1) the statement was made spontaneously to a close acquaintance shortly after the crime occurred, (2) the statement was corroborated by other evidence, (3) the statement was self-incriminating and against the declarant's interest, and (4) there was an adequate opportunity for cross-examination of the declarant. (Chambers, 410 U.S. at 300-01, 35 L. Ed. 2d at 312, 93 S. Ct. at 1048-49.) We have held, however, that these four indicia are not requirements of admissibility. Accordingly, they need not all be present in order for a declaration to be admissible. The question to be considered in judging the admissibility of a declaration is simply whether the declaration was made under circumstances that provide "considerable assurance" of its reliability by objective

indicia of trustworthiness. Bowel, 111 Ill. 2d at 67.

Two of the factors enumerated in Chambers are present here. In Chambers, the Supreme Court found that certain confessions were against the declarant's penal interest where they were, "in a very real sense self-incriminatory and unquestionably against interest." (Chambers, 410 U.S. at 301, 35 L. Ed. 2d at 312, 93 S. Ct. at 1048.) Pugh's declaration that he possessed heroin for two hours was both self-incriminating and against his interest. No credible argument could be made that making that declaration was not against his penal interest. See People v. Kokoraleis (1986), 149 Ill. App. 3d 1000.

The second factor present here is the State's opportunity to cross-examine Pugh. This court held in People v. Horton (1976), 65 Ill.2d 413, 416, that an ample opportunity to cross-examine must be decided upon by the circumstances in each case. I disagree with the majority's conclusion that the State's opportunity was not adequate in the case at bar. Pugh was in court under oath, and the State plainly had every chance to question Pugh regarding whether he possessed the heroin in his pants for two hours or, alternatively, whether defendant Rice handed it to him as Officer Drozd approached their automobile.

The State protests that it would have liked to question Pugh regarding the additional issue of his relationship with the defendant, but had no motive to do so at the suppression hearing. I find this contention

unpersuasive. Considering the facts of the crime--Pugh and defendant were arrested while driving around together--and the nature of Pugh's admission, I believe that the State had every reason to pursue the matter further in order to ascertain why Pugh acted as he did.

An additional indicium of reliability to provide "considerable assurance" of trustworthiness in this case is the fact that the statement was made in a courtroom under oath. These circumstances distinguish this case from the court's decisions in People v. Bowel and People v. Tate which applied the same analysis to declarations against penal interest. In neither of those cases were the declarations at issue made under oath or made in a courtroom, as they were here. The codefendant's testimony in this case was sufficiently trustworthy, and the trial court should not have prevented the jury from hearing it.

Although the admission of evidence is within the sound discretion of the trial court and the court's ruling should not be reversed absent a clear showing of abuse of that discretion (Bowel, 111 Ill. 2d at 68), I believe that such an abuse occurred in this case. Defendant was denied a fair trial and is entitled to be tried again. I would therefore affirm the judgment of the appellate court.

CHIEF JUSTICE BILANDIC and JUSTICE McMORROW join in this dissent.

(2)

Supreme Court, U.S.
FILED

No.

031475 DEC 29 2003

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN RICE,

Petitioner,

vs.

TERRY McCANN, Warden,
Centralia Correctional Center,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

SUPPLEMENTAL APPENDIX
Order of the United States District Court
Decided 9/29/00 and Docketed 10/6/00

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App. 1

[Dated September 29, 2000]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

No. 00 C 3997

United State [sic] of America ex rel. KEVIN RICE, Plaintiff, v. RONALD HAWS, Warden, Defendant.

MEMORANDUM OPINION AND ORDER

Kevin Rice petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Rice names Warden Ronald Haws as respondent. Respondent informed the court in its response brief that Haws has been replaced by Edwin Bowen as warden of the Centralia Correction [sic] Center. Therefore, pursuant to Rule 2(a) of the Rules governing § 2254 cases, Warden Bowen is substituted as the respondent.

BACKGROUND

The factual findings of a state trial or appellate court are presumed true in a federal habeas proceeding unless the petitioner rebuts the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). As there is no evidence before the court to rebut this presumption, the court adopts the Illinois appellate court's statement of facts. *People v. Rice*, 247 Ill. App. 3d 415 (Ill.App. 1993).

In 1992, Rice was convicted of possession of heroin in the Circuit Court of Cook County, Illinois. He was sen-

tenced to a prison term of 20 years. On May 27, 1993, the Illinois appellate court reversed because the trial court excluded statements by Rice's co-defendant that were against his penal interest at a suppression hearing. On April 20, 1995, the Illinois Supreme Court reversed and remanded, finding the trial court did not err in excluding the testimony at Rice's trial because the state did not have an adequate opportunity to cross-examine Rice's co-defendant at the suppression hearing. *People v. Rice*, 166 Ill. 2d 35 (Ill.1995). On December 30, 1996, the appellate court affirmed all remaining issues. *People v. Rice*, 286 Ill. App. 3d 394 (Ill.App. 1996). Rice filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on June 4, 1997. *People v. Rice*, No. 82941 (Ill. 1997). Resp. Br., Ex. G.

While pursuing his direct appeal, Rice also filed a post-conviction petition in the Circuit Court of Cook County on September 12, 1996. On February 26, 1997, the trial court summarily dismissed the petition as frivolous and without merit pursuant to 725 ILCS 5/122-2.1. *People v. Rice*, No. 89 CR 16842. Resp. Br., Ex. H. The dismissal was affirmed by the appellate court on May 17, 1999. *People v. Rice*, No. 1-97-1181. *Id.* at Ex. K. That opinion concluded, *inter alia*, that the post-conviction petition was untimely filed. This issue was not briefed by the parties at the trial court level because the petition was summarily dismissed by the trial judge without awaiting a response by the state. Rice's appeal of this decision to the Illinois Supreme Court was denied on October 6, 1999. *People v. Rice*, No. 87765. *Id.* at Ex. M.

Rice originally filed his habeas petition in this court on November 13, 1997. *Rice v. Haws*, No. 97 C 7908 (N.D. Ill. 1997) (Conlon, J.). The petition was dismissed without prejudice for failure to exhaust state remedies. On

May 9, 2000, Rice moved to "renew" his habeas petition before this court. The court struck the renewed petition and supporting memorandum, suggesting that Rice file a new petition.

On June 30, 2000, Rice filed this petition for a writ of habeas corpus. *Rice v. Haws*, No. 00 C 3997. The petition alleges various errors in Rice's trial: exclusion of exculpatory evidence, improper jury instructions, and refusal to grant a severance of the co-defendants. It also alleges that the prosecutors failed to provide exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Bowen moves to dismiss the petition as time-barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

DISCUSSION

I AEDPA's statute of limitations

Before this court reaches the merits of Rice's petition for a writ of habeas corpus, it must first determine whether the petition was timely filed. The AEDPA amended 28 U.S.C. § 2244 and placed a one-year statute of limitations on the filing of a habeas corpus petition under § 2254. The one-year limitations period, with certain exceptions not applicable to this case, begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). When no petition for a writ of *certiorari* is filed with the Supreme Court, a judgment becomes final for the purposes of § 2244(d)(1)(A) when the time for filing the petition expires. *United States ex. [sic] rel. Gonzalez v. DeTella*, 6 F. Supp. 2d 780, 781 (N.D.Ill. 1999) (*rev'd on*

other grounds). Under Supreme Court Rule 13, the time for filing expires 90 days after the entry of judgment to be reviewed. Therefore, the judgment in Rice's case became final, and the statute of limitations began to accrue, on September 3, 1997—90 days after the Illinois Supreme Court denied Rice leave to appeal on June 4, 1997.

Thus, the one-year statute of limitations for Rice to file a habeas petition expired on September 3, 1998, unless the statute of limitations was tolled. Rice filed his current habeas petition on June 30, 2000, well after the statute of limitations expired. Therefore, if the statute of limitations was not tolled, Rice's petition is time-barred.

II Tolling of statute of limitations

1. The effect of state post-conviction filings

Under the AEDPA, "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). Rice filed a post-conviction petition on September 12, 1996. His post-conviction proceedings concluded on October 6, 1999. Therefore, if the application for state post-conviction relief was "properly filed," the June 30, 2000 filing would be within the one-year statute of limitations.

a. The state post-conviction petition

A post-conviction petition that is untimely under Illinois law is not "properly filed" within the meaning of

§ 2244(d)(2). *Freeman v. Page*, 208 F.3d 572, 574 (7th Cir. 2000). The Illinois appellate court dismissed Rice's post-conviction petition because, *inter alia*, it was untimely.[1] Resp. Br., Ex. K at 8. The Illinois Supreme Court denied Rice's appeal of this decision. *Id.* at Ex. M. Therefore, Rice's petition was not properly filed, and his one-year statute of limitations was not tolled.

Rice argues this court should treat his petition as timely despite the state courts' resolution of the state-law dispute. He argues that this court should review *de novo* the state courts' determinations that the post-conviction petition was untimely. However, the state courts' decisions as to whether a post-conviction petition is properly filed is a matter of state law that is binding on the reviewing federal court. *Freeman*, 208 F.3d at 575.

Rice argues *Freeman* does not apply to him because, unlike the defendant in that case, he never had an opportunity to litigate the timeliness of the state post-conviction petition before the state courts. This argument fails because Rice did have the opportunity to litigate this issue in state court. The state first raised the issue before the Illinois appellate court. Rice had the opportunity to respond to the argument in his appellate brief. Moreover, Rice took advantage of this opportunity and addressed the state's timeliness argument. He argued to the appellate court that the state waived its

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[1] The court dismissed Rice's petition under 725 ILCS 5/122-1, which provides that the time limit for filing a post-conviction petition is six months after denial of a petition for leave to appeal or issuance of an Illinois Supreme Court opinion; or three years after the date of conviction, whichever is later. These time limitations apply unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

timeliness argument, and that the delay in filing the petition was not due to Rice's culpable negligence, but rather to his attorney's mistake. Resp. Br., Ex. N, p. [sic] 4-8. The appellate court rejected Rice's argument that the state waived its timeliness objection. *Id.* at Ex. K, p. 10. The state appellate court also rejected Rice's argument that the delay was not due to his culpable negligence. *Id.* at p. 11. Rice appealed these decisions to the Illinois Supreme Court, which rejected his petition for leave to appeal. *Id.* at Ex. M. Rice's argument that he did not have an opportunity to litigate the state courts' rejection of his petition as untimely is without a basis in the record.

b. Due process right to an evidentiary hearing

Rice argues his right to due process under the Fourteenth Amendment was violated when the state refused to grant him an evidentiary hearing on the issue of whether his state post-conviction petition was timely filed. This argument must fail. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *McKenzie v. City of Chicago*, 118 F.3d 552, 557 (7th Cir. 1997). Rice was given the opportunity, and used that opportunity, to argue his claims of waiver and culpable negligence to the state appellate court. The appellate court considered Rice's claims and rejected them. The state courts' procedure did not violate Rice's due process rights.

Rice also argues that he is entitled to an evidentiary hearing before this court. *Burris v. Parke*, 116 F.3d 256, 259 (7th Cir. 1997); *Berry v. Gramley*, 74 F. Supp. 2d 808, 809 at n.1 (N.D.Ill. 1999). This argument lacks

merit. A federal hearing is required only when the habeas petitioner has alleged facts that, if proved, would entitle him to relief. *Porter v. Gramley*, 112 F.3d 1308, 1314 (7th Cir. 1997) (citing *Townsend v. Sain*, 372 U.S. 293 (1963)). Rice has not alleged facts that would entitle him to relief. Rice alleges that the state court incorrectly ruled that his post-conviction petition was not timely filed. This is a question of state law. Perceived errors of state law are not cognizable on federal habeas review. *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

c. Due process right to present a defense

Rice argues that his due process right to present a valid defense was violated when the state court refused to conduct a hearing on the issue whether his post-conviction petition was not time-barred, citing *People v. Moore*, 133 Ill. 2d 331 (Ill. 1990); *People v. Keeney*, 45 Ill. 2d 280 (Ill. 1970); *Rodriguez v. United States*, 395 U.S. 327 (1969); *Lozada v. Deeds*, 498 U.S. 430 (1991); *Bell v. Lockhart*, 795 F.2d 655 (8th Cir. 1986). None of these cases is applicable here. Each case relates to an attorney's error on direct appeal. The error by Rice's attorney was made on collateral review. Due process does not prevent this error from foreclosing his appeal on statute of limitations grounds. *See Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991). Further, Rice was given an opportunity to present his defense on the untimeliness argument in his brief to the Illinois appellate court.

d. Waiver of the state's timeliness argument

Rice argues that the state waived its untimeliness objection and therefore his petition should be treated as

timely. This argument lacks merit. The state appellate court explicitly rejected Rice's argument that the state waived its untimeliness objection. Resp. Br., Ex. K, p. 9. The Illinois Supreme Court denied leave to appeal. *Id.* at Ex. M. This court is bound by the Illinois appellate court's interpretation of state law as to whether the untimeliness argument was waived. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Freeman*, 208 F.3d at 575. This is not a proper claim for habeas review. *Pulley*, 465 U.S. at 41.

e. Constitutionality of 725 ILCS 5/122-1(c)

Finally, Rice argues that the Illinois post-conviction hearing statute, 725 ILCS 5/122-1(c), violates his Fourteenth Amendment rights to due process and equal protection because it irrationally treats identically-situated prisoners differently. This argument is frivolous.

The portion of 725 ILCS 5/122-1 challenged provides:

> (c) No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed . . . or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

Rice argues that this provision violates due process because defendants who file a direct appeal must file a post-conviction petition within six months after denial of leave to appeal, but defendants who do not file a direct appeal have three years from the date of their conviction to file a post-conviction petition. Rice argues that this

provision irrationally treats identically-situated individuals differently.

Rice has not argued that the challenged provision involves a suspect class or a fundamental right. Therefore, in order to establish that this provision violates the equal protection or due process clauses of the Fourteenth Amendment,[2] Rice must show there is no rational relationship between the classification in the statute and a legitimate government purpose. *Heller v. Doe*, 509 U.S. 312, 320 (1993). A statute is presumed constitutional and the burden is on the one attacking the legislative provision to negative any conceivable basis that might support it. *Id.* at 320-21.

Rice has not met this burden. He alleges that the statute treats identically-situated individuals differently. However, the individuals treated differently by the statute are not identical. One group has chosen to pursue a direct appeal, while the other has not. Rice further argues that the different treatment of these two groups is irrational. Without presuming to know why the Illinois legislature chose to make the distinction it did, there are many rational reasons upon which a distinction may be made between individuals who have chosen to pursue a direct appeal and those who have chosen not to.[3] Choosing to pursue a direct appeal consumes state time and resources, and provides a defendant with an

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[2] The standard for validity is the same under either clause. *Turner v. Glickman*, 207 F.3d 419, 424, 426 (7th Cir. 2000).

[3] "It is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Comm., Inc.*, 508 U.S. 307, 315 (1993).

opportunity for judicial review. Allowing those who do not file a direct appeal a longer period to seek post-conviction collateral relief is rational. This is only one potential basis upon which the legislation may have been founded, but it is enough. *Id.* at 319 (classification must be upheld if any reasonable conceivable state of facts could provide rational basis for classification). Rice's argument that 725 ILCS 5/122-1(c) violates due process and equal protection must be rejected.

2. The original federal habeas corpus petition

Rice originally filed a habeas petition with this court on November 13, 1997. This petition was dismissed without prejudice for failure to exhaust state remedies. Dismissal of Rice's petition, rather than staying the petition until state remedies were exhausted, was proper. *Slack v. McDaniel*, 120 S. Ct. 1595, 1606 (2000); *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993) (dismissal proper even if dismissal will lead to a defense of statute of limitations upon re-filing). Rice's filing of a previous habeas petition did not toll the statute of limitations for the current petition. *Slack*, 120 S. Ct. at 1606 (petition filed after a previous petition was dismissed on exhaustion grounds is treated as a first petition); *Heck*, 997 F.2d at 357. Rice's only potential recourse is the doctrine of equitable tolling. *Id.*

3. Equitable tolling

The AEDPA [sic] one-year statute of limitations is subject to equitable tolling. *Taliani v. Chrans*, 189 F.3d 597 (7th Cir. 1999). Under this doctrine, Rice's failure to file his habeas petition within the limitations period may

be excused only if he shows that he "could not, despite the exercise of reasonable diligence, have discovered all the information he needed in order to be able to file his claim on time." *Id.* at 597-98. In other words, "[e]xtraordinary circumstances far beyond the litigant's control must have prevented timely filing." *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. May 15, 2000). Equitable tolling is granted sparingly. *Id.* (citing *Irwin v. Dep. of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

Rice has not proffered any conditions that entitle him to equitable tolling. Rice possessed all the necessary information to file a habeas corpus petition prior to expiration of the statute of limitations. No allegation of circumstances beyond Rice's control that preventing [sic] his timely filing have been advanced.

Rice's contention that the state waived its statute of limitations defense is not a ground for equitable tolling. Equitable tolling is concerned with whether Rice exercised reasonable diligence in the pursuit of his claim. *Taliani*, 189 F.3d at 597. Rice's argument is irrelevant to the question whether he was diligent in filing his post-conviction petition.

Rice contends the state petition was untimely filed due to the error of counsel as a basis for equitable tolling. "A lawyer's mistake is not a valid basis for equitable tolling." *Taliani*, 189 F.3d at 598. "The petitioner bears the risk in federal habeas for all attorney errors made in the course of representation," because "the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation." *Coleman*, 501 U.S. at 753-54.

Finally, the fact that Rice filed a habeas petition with this court on November 13, 1997, does not establish a

basis for equitable tolling. The Seventh Circuit has allowed for the possibility of equitable tolling where an original habeas petition is dismissed and a new habeas petition is barred by the statute of limitations. *Heck*, 997 F.2d at 357. However, in order to invoke equitable estoppel in this situation, a petitioner must "proceed with due diligence to exhaust his state remedies and to file the renewed [habeas] suit as soon as possible afterward." *Id.* at 358. Rice has failed to satisfy this requirement. Rice failed to pursue his state claims with due diligence. He filed his post-conviction appeal in the Illinois appellate court 13 months after the trial judge dismissed the post-conviction petition.[4] The appellate court then affirmed the dismissal of Rice's post-conviction petition as untimely.

In addition, Rice failed to pursue his federal claims with due diligence. Though he filed a habeas petition on November 13, 1997, this filing did not toll the statute of limitations. Even if Rice believed that this filing tolled the statute of limitations, an erroneous belief would not justify equitable tolling. *See United States v. Griffin*, 58 F. Supp. 2d 863, 868 (N.D.Ill. 1999) (claim of ignorance of the law not sufficient to warrant equitable tolling). At the very least, Rice should have filed a habeas petition immediately after the Illinois Supreme Court rejected his final post-conviction appeal on October 6, 1999. Instead, Rice did not file this habeas petition until June

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[4] The trial court dismissed Rice's claims on February 26, 1997; Rice filed his state appeal from this decision on March 20, 1998.

30, 2000, nearly nine months later.[5]

Rice's failure to pursue his state and federal claims with due diligence is further evidenced by the fact that Rice was represented by counsel throughout his post-conviction proceedings, in both federal and state court. This is not the case of an unwary *pro se* prisoner caught in an interjurisdictional procedural web. Rice's attorney should be well aware of the procedural aspects of post-conviction proceedings. He failed to follow them. This failure must be attributed to Rice. His attorney acted as his agent in all post-conviction proceedings. *Marcello*, 212 F.3d at 1010.[6]

III Merits of Rice's claims

Even if this court were to consider Rice's petition on the merits, it does not appear that there is any merit to his claims. Most of Rice's habeas claims are based on purported errors by the trial court involving application of state law. Rice contends that the trial court improperly excluded exculpatory evidence [Count 1]. He asserts that the trial court erred in its opening jury instructions [Count 2], as well as its closing jury instruc-

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[5] Rice filed an inappropriate motion to "renew" his original habeas petition on May 9, 2000, seven months after his post-conviction proceedings were exhausted.

[6] *Marcello* demonstrates that one's circumstances must be extraordinary in order for equitable tolling to apply. In that case, the habeas petition was filed one day after the filing deadline because, *inter alia*, the attorney's father had just passed away. Equitable tolling for one day was not granted. *Id.* at 1010.

tions [Counts 3 and 4]. He further argues that the trial court improperly denied a severance between Rice and a co-defendant [Count 5]. He fails to establish that these purported trial errors raise a constitutional basis for habeas review. *Brecht v. Abrahamson*, 944 F.2d 1363, 1374 (7th Cir. 1991); *Gilmore v. Taylor*, 508 U.S. 333, 344 (1993).

In addition, Rice claims the prosecution did not turn over material adversely affecting a prosecution witness' credibility, in violation of *Brady v. Maryland*. He asserts that Officer Drozd, the prosecution's eyewitness, had a drinking problem and that while undercover Drozd consorted with members of a rival gang. Rice requested information of "rumors" he had heard about Officer Drozd. The prosecution responded that it did not have "rumor" information. Rice speculates the prosecution had "rumor" information, and claims he is entitled to discovery to determine whether a *Brady* violation occurred. Rice clearly has no evidence of a *Brady* violation. Moreover, Rice must show that there is a reasonable probability that "rumor" information would be admissible evidence that would have affected the result at trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985). He must also show prejudice due to the violation. *United States v. Cruz-Velasco*, ___ F.3d ___, 2000 WL 1160859 (7th Cir. Aug. 17, 2000). Prejudice exists when the defendant "is unduly surprised and lacks an adequate opportunity to prepare a defense, or when the violation substantially influences the jury." *Id.* Rice has not met this burden.

CONCLUSION

The petition ro [sic] a write [sic] of habeas corpus is denied.

ENTER:

Suzanne B. Conlon
United States District Judge

September 29, 2000

(3)

Supreme Court, U.S.
FILED
SEP 24 2004
OFFICE OF THE CLERK

No. 03-1475

In the Supreme Court of the United States

KEVIN RICE, PETITIONER,

v.

TERRY MCCANN, WARDEN, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit's factbound application of the AEDPA's deferential standard for reviewing final state court judgments, which declined to disturb the Illinois Supreme Court's factbound application of the four-part test set forth in *Chambers v. Mississippi*, 410 U.S. 284 (1973), was correct.

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BRIEF IN OPPOSITION

The standard employed by federal habeas courts is by now altogether familiar: under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a habeas petitioner may obtain relief if the state court's judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The deference required by the AEDPA reaches its apex where the "clearly established Federal law" applied by the state court consists of a general, multifactor standard. See *Yarbarough v. Alvarado*, 124 S. Ct. 2140, 2149-2150 (2004).

In this case, petitioner sought habeas relief on the ground that the Illinois Supreme Court unreasonably applied the four-factor test set forth in *Chambers v. Mississippi*, 410 U.S. 284 (1973), to the particular facts of his case. The Seventh Circuit held that the Illinois Supreme Court's factbound application of *Chambers* was not unreasonable. In so holding, the court correctly applied the AEDPA's deferential standard. More importantly for present purposes, the Seventh Circuit's decision conflicts with no decision from this Court or from any other circuit. Finally, this Court denied certiorari on petitioner's *Chambers* claim when this case was on direct review, and there is even less reason to grant certiorari now, when the case is on collateral review, than there was then. For these reasons, certiorari should be denied.

STATEMENT

A. On June 13, 1989, Chicago police officers Robert Drozd and Michael Cronin pulled over a car for speeding. Officer Drozd approached the passenger's side of the vehicle, while Officer Cronin approached the driver's side. Through the open passenger window, Officer Drozd observed petitioner, who was

the driver, hand a brown paper bag to the passenger, Raymond Pugh. Believing that the bag contained a weapon, Officer Drozd ordered Pugh out of the car and conducted a pat-down search. Officer Drozd recovered the bag and found what appeared to be an illegal substance, which subsequent lab tests revealed to be heroin. Officer Drozd informed Officer Cronin that he had observed petitioner transfer the bag to Pugh. At this point, Officer Cronin arrested petitioner. Pet. App. 2.

B. Petitioner and Pugh were tried together. Before trial, Pugh moved to suppress the heroin. Pugh testified that he had placed the bag down his pants two hours before he and petitioner were stopped by the officers. Thus, according to Pugh, Officer Drozd could not have observed the bag prior to the pat-down search, which means that he could not possibly have had probable cause to conduct the search. The State presented testimony that petitioner indeed transferred the bag to Pugh. The trial court denied Pugh's motion to suppress. Pet. App. 2-3.

At trial, Officer Drozd testified that he saw petitioner hand Pugh the paper bag and watched Pugh put the bag down his pants. After the State rested, petitioner denied handling the bag or the heroin and called Pugh to testify that Pugh had placed the bag down his pants two hours earlier. Pugh invoked his Fifth Amendment right not to testify. Petitioner moved to admit Pugh's suppression hearing testimony, but the trial court denied the motion on hearsay grounds. The jury convicted petitioner of possession of heroin with intent to deliver, and the trial court sentenced him to twenty years in prison. Pet. App. 3.

C. The Illinois Appellate Court reversed the conviction, holding that the trial court violated *Chambers v. Mississippi*, *supra*, in refusing to admit Pugh's suppression hearing testimony at trial. *People v. Rice*, 247 Ill. App. 3d 415, 617 N.E.2d 360 (1993). *Chambers* holds that, under certain limited

circumstances, due process may require the admission of hearsay that otherwise would be barred by state law. 410 U.S. at 302. *Chambers* provides four factors to evaluate in considering whether such hearsay must be admitted: (1) whether the statement was made shortly after the crime to a close acquaintance; (2) whether other evidence or circumstances corroborate the statement; (3) whether the statement was self-incriminating and against the declarant's penal interest; and (4) whether the declarant was subject to adequate cross-examination. *Id.* at 300-301.

The Illinois Appellate Court held that Pugh's suppression hearing testimony satisfied three of the four *Chambers* factors — it was corroborated by other evidence, was against his penal interest, and was subject to cross-examination. 247 Ill. App. 3d at 419, 617 N.E.2d at 363. For that reason, the court concluded, the trial court's exclusion of Pugh's former testimony denied petitioner a fair trial.

D. The Illinois Supreme Court reversed and remanded, finding that *Chambers* did not require admission of Pugh's suppression hearing testimony. Pet. App. 15-29. The majority agreed with the Illinois Appellate Court that the third *Chambers* factor supported admission and the first factor weighed against admission. *Id.* 24-25. However, the court disagreed with the appellate court regarding the second and fourth *Chambers* factors, finding that Pugh's testimony was not corroborated by any other evidence, and was not subject to adequate cross-examination because the issues at stake in the suppression hearing were limited. *Id.* 25-26. The court also noted that Pugh's testimony, while technically against his penal interest within the meaning of the third *Chambers* factor, actually would have benefitted Pugh "because, if his testimony had been believed [at the suppression hearing], his motion [to suppress] would have been granted and the evidence against him suppressed." *Id.* 25.

Three Justices of the Illinois Supreme Court dissented. The dissent parted company with the majority with respect to only the fourth *Chambers* factor, contending that the State had an adequate opportunity to cross-examine Pugh at the suppression hearing. Pet. App. 28-29. The dissent did not address the disagreement between the majority and the Illinois Appellate Court regarding the first *Chambers* factor — *i.e.*, whether Pugh's suppression hearing testimony was corroborated by other evidence.

E. This Court denied petitioner's petition for writ of certiorari. *Rice v. Illinois*, 516 U.S. 932 (1995). That petition presented a question identical to the second question presented in this petition. See Petition for Writ of Certiorari in *Rice v. Illinois*, No. 95-337, at i ("Whether defendant's Sixth and Fourteenth Amendment rights to present exculpatory evidence were violated when defendant was prevented from presenting crucial exculpatory evidence, the prior sworn testimony of a witness who was cross-examined by the prosecution at a pre-trial motion to suppress . . . .").

F. After further unsuccessful proceedings on direct review and state post-conviction review, petitioner filed a habeas petition in federal district court, which was denied. See *Rice v. Bowen*, 2001 WL 1035262 (N.D. Ill.).

G. The Seventh Circuit affirmed. At the outset of its analysis, the majority noted that the AEDPA required the denial of habeas relief unless the Illinois Supreme Court's application of *Chambers* was objectively unreasonable. Pet. App. 4-5. The majority further noted that its role was not to determine whether the Illinois Supreme Court correctly held that Pugh's suppression hearing testimony was inadmissible under Illinois evidence law. *Id.* 5. Rather, assuming that Pugh's testimony was inadmissible under Illinois law, the court examined whether *Chambers* required the admission of that testimony as

a matter of federal due process — or, to be more precise, whether the Illinois Supreme Court was objectively unreasonable in holding that *Chambers* did not require admission.

The Seventh Circuit held that the Illinois Supreme Court's decision was not objectively unreasonable. The court noted that the Illinois Supreme Court and Illinois Appellate Court agreed on the first and third *Chambers* factors, and disagreed only on the second and fourth factors. Pet. App. 6-7. With respect to the second factor — which was the only factor that divided the Justices of the Illinois Supreme Court — the Seventh Circuit observed that the majority of the Illinois court "reasoned that because Pugh's suppression hearing focused on different issues then Rice's trial, the State could not have fully tested Pugh's reliability." *Id.* 7. The Seventh Circuit concluded that "[t]he Illinois courts' dispute over the *Chambers*' factors reveals that reasonable minds can differ as to the proper application of the law to the facts of Rice's case." *Ibid.*

Judge Posner dissented. Of the two *Chambers* factors that divided the Illinois Supreme Court and the Illinois Appellate Court, Judge Posner focused only on the opportunity for cross-examination at Pugh's suppression hearing, contending that the State's opportunity was adequate for *Chambers* purposes. Pet. App. 9-12. Judge Posner did not address whether Pugh's testimony was corroborated. *Id.* 9. Based upon his view of the cross-examination factor, Judge Posner concluded that the Illinois Supreme Court's application of *Chambers* was objectively unreasonable. *Id.* 12.

H. Petitioner filed petitions for rehearing and for rehearing en banc. All three members of the panel, including the dissenting judge, voted to deny rehearing. No judge in active service requested a vote on the en banc petition. Pet. App. 13-14.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court's criteria for a grant of certiorari. Petitioner does not argue that the Seventh Circuit's application of the AEDPA conflicts with a decision of another federal court of appeals or this Court. Nor does petitioner identify any doctrinal matter that requires this Court's clarification. Rather, petitioner merely contends that the Seventh Circuit and Illinois Supreme Court incorrectly applied settled law to the particular facts of his case. Because this case involves only the Seventh Circuit's factbound application of the AEDPA, in which it declined to disturb the Illinois Supreme Court's factbound application of *Chambers*, certiorari should be denied.

In arguing that the Seventh Circuit incorrectly applied the AEDPA, petitioner simply quotes a substantial portion of Judge Posner's dissent. Pet. 10-13. But the fact that Judge Posner disagreed with the majority's application of settled law to the facts of this case does not warrant certiorari. Indeed, notwithstanding his dissent, Judge Posner did not find this case worthy of panel or en banc rehearing. Pet. App. 13-14.

For these reasons alone, certiorari should be denied. In any event, the Seventh Circuit's decision — that the Illinois Supreme Court's application of *Chambers* was not objectively unreasonable — was correct on the merits.

The defendant in *Chambers* was tried for a murder that a another person had confessed to committing. 410 U.S. at 292-293. Under Mississippi law, the defendant could not cross-examine the confessor or call the confessor's friends to testify at his trial. *Id.* at 291-294. This Court held that "under the facts and circumstances of this case," due process required that defendant be allowed to present the exculpatory testimony despite its noncompliance with state evidence law. *Id.* at 303. In so holding, the Court emphasized that a statement must bear

persuasive assurances of reliability to qualify for this exception. *Id.* at 302. As noted above, reliability under *Chambers* is measured by four factors: (1) whether the statements were made shortly after the crime to close acquaintances; (2) whether the statements were corroborated by other evidence; (3) whether the statements were self-incriminatory and unquestionably against interest, as the declarant "stood to benefit nothing" by disclosing his role in the crime; and (4) whether the declarant was available at trial for cross-examination. *Id.* at 300-301.

With respect to the first factor, the Illinois Supreme Court found that Pugh's suppression hearing testimony was not a spontaneous statement to a close acquaintance, but rather was made twenty-two months after the officers seized the heroin. Pet. App. 25. With respect to the second factor, the court held that Pugh's former testimony was not corroborated by any other evidence. *Id.* 26.

With respect to the third factor, the court found that Pugh's suppression hearing testimony was against his penal interest, which weighed in favor of admissibility under *Chambers*. Pet. App. 24. Still, the court tempered that finding by noting that Pugh "stood to benefit at the suppression hearing by making the statement in question because, if his testimony had been believed, his motion would have been granted and the evidence against him suppressed." *Id.* 25. This necessarily diminished the importance of this factor. After all, a principal rationale of the *Chambers* rule — that "a person is unlikely to fabricate a statement against his own interest at the time it is made," *Chambers*, 410 U.S. at 299 — is absent here because, at the time Pugh offered his suppression hearing testimony, it was functionally *not* against his penal interest.[1]

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[1] Pugh's suppression hearing testimony could not have been used against him at his criminal trial. *Simmons v. United States*, 390 U.S. 377, 389-390 (1968). Despite *Simmons*, petitioner argues that

Finally, with respect to the fourth factor, the Illinois Supreme Court found that the State's cross-examination of Pugh during the suppression hearing was limited. The issue during the suppression hearing was whether Officer Drozd saw Pugh tuck a brown paper bag into his pants, thus providing probable cause to search Pugh. Pet. App. 25. Given the limited focus of the suppression hearing, the court found, the State limited its cross-examination to Pugh's actions prior to the search, his self-interest in testifying falsely, and issues presented by the motion to suppress. *Id.* 21, 25. The issue at the criminal trial, by contrast, was guilt or innocence, and the State's focus in cross-examining Pugh at trial would have been "any motive [Pugh] might have in making exculpatory statements on behalf of defendant." *Id.* 21.

For these reasons, the Illinois Supreme Court found that *Chambers* did not require the admission of Pugh's suppression hearing testimony at petitioner's criminal trial. This straightforward application of *Chambers* was correct. True, three Justices of the Illinois Supreme Court dissented on the ground that the majority had misapplied the fourth *Chambers* factor. Pet. App. 28-29. But the majority's finding that there was inadequate opportunity to cross-examine Pugh at the suppression hearing — which relied in large part upon the different purposes of the suppression hearing and the criminal trial — is sound. See 2 J. Strong, *McCormick on Evidence* § 304, at 315 (4th ed. 1992) ("similar motive" requires, "[a]t

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Pugh's testimony was against his interest because it could have been used to impeach Pugh if he testified at trial. Pet. 17 (citing *Harris v. New York*, 401 U.S. 222 (1971)). However, there is no "interest" in committing perjury. *Harris*, 401 U.S. at 225 ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.") Thus, Pugh's suppression hearing testimony was not against a *valid* interest of his.

most, the issue on which the testimony was offered in the first [proceeding] must be the same as the issue upon which it is offered in the second"). Moreover, although Pugh was subject to cross-examination at the suppression hearing, "his demeanor and responses [were not] weighed by the jury." *Chambers*, 410 U.S. at 301.

Is the Illinois Supreme Court's application of *Chambers* unassailable? Of course not, as the Seventh Circuit majority candidly acknowledged. Pet. App. 7-8. But the Illinois court's decision, even if open to question, was not objectively unreasonable under the AEDPA. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

This deference is particularly acute where, as here, the state court applied a general, multifactor test. In *Yarborough v. Alvarado*, 124 S. Ct. 2140 (2004), this Court considered whether the state appellate court had unreasonably applied the test for determining whether a suspect is in custody for *Miranda* purposes. The Court noted that the custody determination depends upon numerous factors. *Id.* at 2149-2150. The Court characterized this type of multifactor test as a "general" rule, which "can demand a substantial element of judgment." *Id.* at 2149. Given this, a federal court operating under the AEDPA must give "more leeway" to a state court's application of such general rules. *Ibid.*

The *Chambers* rule is precisely such a general, multifactor test. The majority of the Illinois Supreme Court found that three of the four *Chambers* factors weighed against admissibility. And while finding that the fourth factor (whether Pugh's statement was against his penal interest) technically weighed in favor of admissibility, the court recognized Pugh's former testimony was actually not against his penal interest at the time it was given. The dissent disagreed with the majority with respect to only one factor, that regarding the adequacy of cross-examination at Pugh's suppression hearing. The message of *Yarborough*, however, is that disagreement over a state court's analysis of one factor of a four-factor test cannot support a conclusion that the state court's analysis was objectively unreasonable.

None of petitioner's other authorities supports his position. Petitioner relies on *Ohio v. Roberts*, 448 U.S. 56 (1980), which concerns the interplay between the hearsay rule and the Confrontation Clause. Pet. 18-20. But this case does not concern whether the trial court admitted hearsay proffered by the prosecution over the defendant's Confrontation Clause objection; Here, petitioner argues that his due process rights required that the trial court accept his tender of Pugh's suppression hearing testimony. *Roberts*, therefore, has no conceivable application here — which is no surprise, given that neither the Seventh Circuit nor the Illinois Supreme Court even cited *Roberts*. It follows that this Court abrogation of *Roberts* in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), is likewise immaterial.

Petitioner also relies on two cases that interpret exceptions to the hearsay rule under the Federal Rules of Evidence, *Bourjaily v. United States*, 483 U.S. 171 (1987) (Rule 801(d)(2)(E), co-conspirator exception), and *United States v. Salerno*, 505 U.S. 317 (1992) (Rule 801(b)(1), the former testimony exception). Pet. 19. But the Federal Rules of

Evidence are not binding on the state courts, and thus have no application on federal habeas review.

In this end, petitioner seeks review of the Seventh Circuit's factbound, splitless application of settled habeas law to the Illinois Supreme Court's factbound, splitless application of *Chambers*. This case does not warrant certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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